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No. 95-00164

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

JOSEPH STOVER,

Petitioner,

V.

NORFOLK & WESTERN RAILWAY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE SUPREME COURT OF VIRGINIA, IN REVIEWING THE SUFFICIENCY OF THE EVIDENCE, PROPERLY CONCLUDED THAT PLAINTIFF FAILED TO ESTABLISH NEGLIGENCE BY HIS RAILROAD EMPLOYER?

II. WHETHER THE SUPREME COURT OF VIRGINIA PROPERLY APPLIED WELL-SETTLED PRINCIPLES OF FORESEEABILITY IN REJECTING PLAINTIFF'S NEGLIGENCE CLAIM?

III. WHETHER THE SUPREME COURT OF VIRGINIA PROPERLY DETERMINED THAT PLAINTIFF MUST INTRODUCE EVIDENCE SUPPORTING A REASONABLE INFERENCE THAT THE ALLEGED DEFECT WAS THE PROBABLE CAUSE OF HIS INJURY, AND THAT PLAINTIFF'S SUGGESTION THAT A POSSIBLE DEFECT MIGHT HAVE CAUSED HIS HARM WAS INSUFFICIENT TO REACH THE JURY?

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REPORTS OF OPINIONS BELOW

The Opinion of the trial court was not officially reported but is reported in the Appendix at pages six to twenty-seven. The Opinion of the Supreme Court of Virginia denying Stover's Petition for Appeal and Affirming the Decision of the Trial Court is reported at 249 Va. 192, 455 S.E.2d 238 (1995), and appears in the Appendix at pages thirty-five to sixty-one.

COUNTERSTATEMENT OF THE CASE

Routine application of established legal principles to the particularized facts of this case resulted in judgment as a matter of law for the Norfolk and Western Railway Company (NW). This conclusion was properly reached both by the trial court and the Supreme Court of Virginia in this action under the Federal Employers Liability Act (FELA).

Stover's Petition takes great liberties with the facts of this case. A fair review of the evidence makes abundantly clear that plaintiff failed to establish negligence. Indeed, plaintiff candidly conceded that his case would not stand without the supporting testimony of his expert Hockaday. (App. 55.)[1] Hockaday's wholly speculative testimony was properly rejected by the lower courts. This case merits no further review by this Court.[2]

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[1]Reference to the Joint Appendix in the Supreme Court of Virginia will be by "J.A. ___." Reference to the Appendix to Stover's Petition will be by "App. ___."

[2]Following extensive briefing and oral argument the trial court set aside the jury verdict and ordered entry of judgment in favor of NW. (J.A. 24-25.) The trial court further ruled that, in the event the judgment for NW were reversed, the evidentiary flaws which prejudiced NW were such that a new trial would be necessary and that the jury's verdict could not stand under any

(continued...)

A. The Alleged Accident.

On September 11, 1990, Stover, a 49-year-old brakeman for NW, felt a twinge in his neck while operating a derail lever on a siding in Rocky Mount, Virginia. Initially, he did not notify officials, nor alert co-workers, of any equipment problem. (J.A. 178.) Later that day, however, plaintiff noticed a numbness in his left arm and reported that fact to his conductor. Plaintiff then said that the derail lever in Rocky Mount had "hung up" on him when he first attempted to operate it.

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[2](...continued)
circumstances. (J.A. 24, 594-597.) Stover never assigned error to this latter ruling and it is now the law of the case. While Stover asks for reinstatement of the jury's verdict as the relief he seeks, such relief is unavailable given the prior unappealed rulings to the contrary.

Although a co-worker had operated the derail without incident following plaintiff's alleged incident, four NW representatives met at the derail later that afternoon and threw it over one hundred times without any difficulty. (J.A. 478-79, 507-08, 552.) The mechanism worked so flawlessly that the inspectors called NW's office to make sure they were inspecting the correct derail. (J.A. 507-08.) They were. Two days later two of these individuals returned and again each threw the derail numerous times. Again, they could find nothing wrong with the operation of the derail. (J.A. 497, 509.) During the following 30 days, no additional lubrication was applied to the derail (J.A. 487), and it continued to operate perfectly. (J.A. 531-32, 536-37.)

B. The Derail.

This derail is a simple mechanism. The unit consisted of: (1) a new Hayes stand and operating lever that had been installed the previous month (J.A. 468); (2) the 90 pound derail; and (3) the housing for the derail which attaches it to the tracks. The Hayes stand provides a 5 to 1 leverage ratio, so that it takes only 18 pounds of pressure to move the derail. (J.A. 543-44.)

Although the derail itself and its housing had been in place for several years, the operating stand was new, and had been in place for a maximum of only six weeks. Plaintiff had operated this new stand on a daily basis since its installation, and he testified that he had never experienced any previous problems with this derail, nor with any of the other derails with the newly

installed stands. (J.A. 126-128, 134.) Other witnesses concurred that there were no prior or subsequent complaints regarding this derail. (J.A. 157, 473.)

It was uncontradicted that new Hayes stands are lubricated at the factory (J.A. 470, 544), and that additional lubrication is not necessary upon installation. (J.A. 544-45.) Plaintiff, who had used this derail frequently during the six-week period prior to his injury, had never suggested to anyone that it needed lubrication (J.A. 90, 126-28, 139), although he had complained about other derails on the system.

All experts acknowledged that if there had been a lubrication problem, throwing the new derail would have become progressively more difficult over time until lubrication had been added. Here, the new mechanism never showed signs of

being difficult to throw in its daily operation for six weeks of operation prior to Stover's incident, or during the following thirty days. (J.A. 531-32.) Yet it was ultimately plaintiff's theory of the case that the derail hung up because it lacked lubrication.

C. The Unsubstantiated Assertion of Negligence.

1. Plaintiff's Testimony

Every witness who explained the operation of the derail mechanism testified that the lever utilized to take the derail off the track must first be moved vertically until it clears a "stop" before the lever may be moved horizontally to the right to actually move the derail. (Stover, J.A. 132; Hockaday, J.A. 265; Gearhart, J.A. 479-81; McCracken, J.A. 546-48.)

Stover testified that he had no idea why the derail hung up. (J.A. 140.) He stated that when he first applied pressure to the derail's lever to move it horizontally to the right, "it didn't come, it didn't give." (J.A. 72.) However, it operated normally on his second attempt (J.A. 129) after he "jerk[ed] up on it and come around with it." (J.A. 134.) Plaintiff acknowledged that he might not have raised the lever high enough the first time to release it, but stated that "I thought I had it up all the way. I might not have had it up all the way. I do not know, and all I know is it hung." (J.A. 136.) He acknowledged that when he reached back, jerked up on it and applied more pressure, "it just flopped." (J.A. 67, 134.)

2. Plaintiff's Expert Testimony

Plaintiff's expert, G.L. Hockaday, a retired union official and former track inspector for the C&O Railroad (J.A. 235, 240), had not serviced a derail since 1974. (J.A. 269.) He had never seen, let alone operated or inspected, this specific derail. (J.A. 273.) He did not know: (a) if the derail ever had been operated since its new operating stand had been installed (J.A. 273, 282); (b) if anyone prior to the plaintiff had thrown the derail on the day in question (J.A. 281-82); or (c) that Hayes stands came pre-lubricated from the factory. (J.A. 282.)

Hockaday based his entire opinion on the discovery deposition of NW's track supervisor (J.A. 272), and on five photos. Incredibly, Hockaday admitted that he did not know if the conditions

depicted in the photos were the same as existed on the day of the accident. (J.A. 267.) Moreover, he acknowledged that the photos he relied upon did not show if there was lubrication in the housing where the internal metal components operate. (J.A. 275.) He did not talk with plaintiff. (J.A. 249.) Hockaday's analysis was rooted in (1) his unstated premise that the derail had in fact malfunctioned and (2) his stated premise that 99 per cent of the time a derail malfunctions, the problem is caused by a lack of lubrication or maintenance. (J.A. 252.) Of course, Hockaday could have no knowledge of whether Stover in fact lifted the lever high enough to clear the stop on his first attempt to take the derail off the track.

3. The Lubrication Issue

Hockaday stated that the pictures taken after the incident showed no evidence of lubrication on the "derail" (meaning the operating stand).[3] He admitted, however, that those pictures gave absolutely no indication as to whether the derail itself inside the housing was lubricated. (J.A. 275.)

Yet, it is the derail itself which is critical to the operation of the derail mechanism. Hockaday simply assumed that if the pictures showed no lubrication on the operating stand, there would be none on the derail itself because he assumed that when the device was lubricated, it would be lubricated

---

[3]Hockaday frequently used the generic term "derail" to refer to the entire derail mechanism, including the derail, its housing unit, and its operating stand.

all over (including the operating stand). (J.A. 220.)

Thus, all of his subsequent testimony flowed from the erroneous assumption that the lack of visible graphite lubrication on the operating stand's lever was somehow proof of a lack of lubrication of the derail itself. (J.A. 220.) This assumption, as the record demonstrates, was plainly wrong since, unbeknownst to Hockaday (J.A. 282), all such stands come from the factory with built-in lubrication. (J.A. 470, 544.)

After summarily concluding that the mechanism lacked lubrication, Hockaday inferred that NW would have known that there was a lubrication problem had it followed proper maintenance procedures. Hockaday concluded from his reading of Gearhart's discovery deposition that the

derails were lubricated only "when he thought they needed it" or after train crews complained they were difficult to operate. (J.A. 281.) This was flatly incorrect.

Hockaday testified that, according to Federal Railway Administration ("FRA") regulations, railroads must inspect derails and switches at least once a month. (J.A. 222, 268.) He admitted that there is no requirement that derails be lubricated on a regular schedule. (J.A. 250, 268.) The procedure followed by other railroads, and by Hockaday, himself, when he was a track inspector, was to report derails which were hard to throw to the track supervisor whose responsibility it was to lubricate the derails on an "as needed" basis. (J.A. 251.)

All evidence in this case shows that NW used this precise procedure. Track Supervisor Gearhart testified that the derail in question sits on a siding which is inspected every thirty days (J.A. 500-01), and that lubrication is applied based upon feed-back received from train crews who operate the equipment, or from the track inspector. (J.A. 471-72.) Gearhart's testimony, that he had never received any complaints on this particular derail (J.A. 473), was buttressed by the testimony of various other NW employees, who testified that the derail worked perfectly, both prior to and following this incident. (J.A. 157-58, 532.)

D. The Decisions Below

The trial court concluded:

> . . .I, having scrutinized Mr. Hockaday's testimony, taking that testimony in the light most

> favorable to Mr. Stover and giving Mr. Stover the benefit of all inferences fairly to be drawn from Mr. Hockaday's testimony, must conclude that it is grounded in surmise and conjecture rather than in objective fact.
>
> If we were in the realm of the jury deciding whether to accept or to disregard particular conclusions to be drawn from solid fact, we would be within the realm of jury questions. Though I submitted this case to the jury, I am now satisfied that the Supreme Court would not affirm a verdict based on Mr. Hockaday's testimony, and more to the point, I am satisfied that the case should not go to the Supreme Court with the plaintiff armed with a jury verdict that the trial judge has approved.
>
> Mr. Hockaday's testimony is indeed cobbled together based upon layers of surmise, conjecture and inference. I have scrutinized the record to see whether I believe the testimony of everybody else, taken together with Mr. Hockaday, or without Mr. Hockaday would support a liability verdict. The answer, unfortunately for Mr. Stover, is no.

(J.A. 594.) The court declared that if it had not set aside the plaintiff's verdict based upon the liability

determination, it would have done so based upon several evidentiary matters which prejudiced NW in its defense.

The Supreme Court of Virginia upheld the trial court's ruling, finding Hockaday's testimony entirely speculative, and that plaintiff wholly failed to establish foreseeability or negligence.

REASONS FOR DENYING THE WRIT

1. This fact intensive case was properly resolved below. Stover conceded that his case was insufficient to reach the jury without the aid of his expert's testimony. (App. 55.) His expert plied inference over assumption, basing his "opinion" on facts not supported by the record.

2. Stover's attempts to cultivate novel issues for review cannot eclipse the plain fact that he failed to

establish FELA negligence here. There was no showing of foreseeability. No one had ever complained concerning this derail, and it had been recently updated. All the evidence confirmed that if a lubrication problem were at work, the derail would have become increasingly more difficult to throw; yet the uncontradicted evidence, from numerous sources, was that this did not occur.

3. Stover could not show that a lack of lubrication existed or that it was a cause of his injury. The Supreme Court of Virginia did not, as plaintiff alleges, require him to prove that the railroad's negligence was the cause of his injury in order to present a jury issue. The court simply called upon him to introduce evidence that would support a reasonable inference that the alleged negligence was a probable cause of his

injury. Stover wishes to prevail upon a showing that a condition which might have existed, might have caused his injury. No decision of this Court supports such a result.

I. PLAINTIFF'S EVIDENCE IN THIS FACT-SPECIFIC CASE FAILED TO ESTABLISH NEGLIGENCE UNDER ANY STANDARD.

The issue in this case from the start was whether plaintiff could prove that his claimed difficulty in moving the derail lever was caused by an alleged lack of lubrication on the derail device. To take the derail off the track, as Stover was doing at the time of his injury, one lifts the Hayes stand lever up about six inches to free the locking mechanism, and then moves the lever to the right about 24 or 25 inches. (J.A. 546.) When the lever is fully lifted, the operating handle has a clearance from the locking mechanism of between 1/4 and

3/8 of an inch. (J.A. 546, 485-86.) If the lever is not lifted at least four inches, the stop will not be cleared and the lever is prevented from moving to the right to operate the derail. Lubrication has nothing to do with the process of how high the operator must lift the lever in order to activate the derail. (J.A. 486-87.)

Stover was the only witness to the alleged accident. His testimony did not establish that his inability to move the lever on his first try was occasioned by any malfunction of the derail. Specifically, plaintiff's testimony was: (1) he rode the train to Rocky Mount "every day but one a week," worked the derails, when there, on a daily basis, and never experienced any problem with this or the other two derails at Rocky Mount before September 11, 1990 (J.A.

127-28); and (2) he had made no complaint to NW about the condition of the derail before the accident. (J.A. 125-28.)

Because his own evidence did not establish any negligence on the part of NW, Stover passed the baton to his expert witness to try to create a cause of action. The Supreme Court of Virginia ruled that the expert's testimony was too flimsy and speculative to be credited.

Here, plaintiff conceded below that without Hockaday's testimony, he did not have a case. (App. 55.) Despite petitioner's creative efforts to transform a review of Hockaday's musings into a cert-worthy undertaking, any meaningful analysis of the record promptly reveals that Hockaday's testimony had no connection to the actual evidence in the case.

Hockaday's lack of familiarity with the derail and the new operating stand, and his lack of inquiry into its prior use or condition have been outlined previously, supra at pp. 11-15. Hockaday's conclusion that the "derail" lacked lubrication came through reliance upon only two sources: a group of five photographs, and the deposition of Gearhart, NW's Track Supervisor (J.A. 272.) The assumptions he made concerning the two sources of his testimony are clearly flawed, rendering his testimony nothing more than speculation piled upon speculation.

A. Hockaday's Conclusion that the Derail was not Lubricated Cannot Logically or Credibly Flow from the Photographs upon Which he Relied.

Hockaday reviewed five photos which he specifically relied upon in reaching his opinion. His statements concerning

those photos reveal volumes as to the liberties he took in "interpreting" them:

> Q. In fact those pictures you have in front of you, sir, that you testified about, do you know when they were taken?
>
> A. No, sir.
>
> Q. So you don't know if those conditions were the same as existed on the day of the accident?
>
> A. No, sir.

(J.A. 266-67.)[4]

Moreover, there is no dispute that the photos did not even show critical portions of the derail:

> Q. So the pictures you are looking at here, sir, they don't give you any indication at all whether or not that derail inside the housing has been lubricated?
>
> A. No, sir.

---

[4]In fact, the photographs upon which Hockaday relied (J.A. 249) were taken two months after the incident in November, 1990. (J.A. 68.)

(J.A. 275.)

* * *

Q. The only thing you know about from these pictures are the newly installed portions, the handle, and the connecting mechanism there; is that correct sir?

A. Yes, sir.

(J.A. 276.)

Hockaday testified that if he could not see lubrication in the photos in areas which are located in an "easy to observe" area of the operating stand, then he would assume that there was no lubrication in the more difficult to reach areas of the derail housing. (J.A. 220.) Hockaday's assumption that the stand was not lubricated was wrong. It is undisputed that it arrived pre-lubricated from the factory (J.A. 470, 544) and that the manufacturer did not recommend further lubrication (J.A.

545) -- facts of which Hockaday was simply unaware.

Q. But you have never seen one of these new levers from the manufacturer?

A. No, sir; I don't believe so.

Q. You have no knowledge of whether they come with lubrication built in or not, do you?

A. No, sir.

Q. This was a new lever, was it not?

A. Yes, sir.

Q. And do you know how many times that had been thrown before September 11, 1990?

A. I have no idea.

Q. Do you know if it had ever been thrown?

A. No sir.

Q. Do you know if Mr. Stover had ever thrown it before?

A. No, sir.

(J.A. 281-82.)[5]

Thus, based on a mistaken belief from the pictures that the new stand was improperly lubricated, Hockaday assumed that the derail housing unit was unlubricated as well.[6] Certainly, the pictures critical to Hockaday's testimony in this regard had no relationship whatsoever to the conclusion drawn from them. (J.A. 275.) His testimony in this regard is nothing but sheer speculation -- and speculation at odds with the evidence at that.

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[5]Hockaday's total lack of knowledge as to the frequency with which the derail was thrown is particularly startling since his theory was that rust will build up if a derail is not used and lubrication is necessary to prevent such a situation. (J.A. 252.)

[6]In fact, there was pre-existing lubrication on the mechanism when the new stand was put in place. (J.A. 526.)

B. Hockaday's Conclusion that the Derail was not Lubricated Cannot Logically or Credibly Flow from the Deposition upon Which he Relied.

Hockaday further suggested that defendant would have known that there was a lubrication problem with this derail had it followed proper maintenance procedures. Hockaday concluded from his reading of Track Supervisor Gearhart's deposition testimony that derails were lubricated only after workers complained about them or when Gearhart thought it was necessary. (J.A. 280-81.)

The evidence of record made clear that NW's policy was to lubricate derails when either workers or inspectors noted problems (J.A. 471-72) and, consistent with FRA rules (J.A. 250), inspections of derails were conducted at least every thirty days. (J.A. 472, 501.) One reason Hockaday may have been ignorant of

NW's actual practice is that the deposition of Gearhart upon which Hockaday relied (J.A. 216-17) addresses NW's inspection practices in only the most superficial way.

Moreover, when Hockaday stated what steps are required by regulation for proper maintenance of derails, he essentially described NW's exact practice. (J.A. 268; see also J.A. 281.)

NW's actual inspection practices, consistent with the FRA rules, were unrebutted at trial. (J.A. 471-72.) All evidence in this case shows that the procedure described by Hockaday is the precise method followed by defendant. Track Supervisor Gearhart testified that this derail sits on a siding which is inspected every thirty days. (J.A. 500-01.) However, lubrication is applied based upon feedback received from train

crews who operate the equipment, or from the track inspector. (J.A. 471-72.) When complaints or requests are received, the derail will be lubricated or repaired before it is used again. (J.A. 472.)

Gearhart testified that he had never received any complaints on this particular derail. (J.A. 473.) This was supported by the testimony of Albert, the conductor of the local run (J.A. 178, 532), who would have passed any requests from his crew to Gearhart. H. C. St. Clair, the rear brakeman who regularly operates the derails in this area, testified that he had experienced no problems with any of the derails in the area, either before or after September 11, 1990, and that he knew of no other crew members who had experienced any problems. (J.A. 153, 157-58.) Plaintiff's own testimony confirmed this

derail's excellent performance history. (J.A. 126-28, 134.)

C. An Expert's Opinion Which is Neither Based Upon Facts Within his own Knowledge nor Established by Other Evidence is Speculative and Possesses No Evidential Value.

The heart of Stover's petition rests upon the contention that Hockaday provided an adequate foundation to support the jury's verdict in this case. The terminal flaw in Hockaday's testimony was that it stacked inference upon inference. His mistaken assumptions also, in critical respects, flew in the face of uncontroverted evidence. At bottom, Hockaday's opinions were unsupported by facts in evidence and utterly fail to prove that Stover was injured because the derail device was not properly lubricated.

To have probative value, an expert's opinion must be based upon facts specific to the case. An expert's opinion which is neither based upon facts within his own knowledge nor established by other evidence is speculative and possesses no evidential value. Thompson v. Southern Pacific Transportation Co., 809 F.2d 1167, 1169 (5th Cir.), cert. denied, 484 U.S. 819 (1987); Gilbert v. Summers, 240 Va. 155, 160, 393 S.E.2d 213, 215 (1990).

What facts, then, did Hockaday marshal to rationalize his opinion? He looked at photographs and declared that he saw no evidence of lubrication. He conveniently ignored that those photographs showed the new, pre-lubricated Hayes stand and not the working, metal-on-metal parts of the derail.

Hockaday compounded his erroneous assessment of the photographs by presuming that the absence of visible graphite on the exterior of the new stand meant there was no lubrication on the working parts of the derail which he could not see in the photos. (J.A. 275-76.) This inference is demonstrably inaccurate since the derail had pre-existing lubrication when the prelubricated stand was installed. (J.A. 526.)

Hockaday magnified his error by assuming that a person would not lubricate just one portion of a derail device. Thus, from the absence of visible lubrication on the external lever of the stand (as he interpreted the photographs) he inferred that the working portion of the derail had not been lubricated. (J.A. 220.)

In short, the pillars upon which Hockaday rested his opinion in this case cannot support his conclusions. He stated bluntly that he reached his conclusions based on the photos and Gearhart's deposition, prior to even reading plaintiff's deposition. (J.A. 272.) He did not test or even view the actual mechanism (J.A. 273), let alone inquire as to how often it was used (J.A. 273, 282) or its condition when it came from the factory. (J.A. 281-82.) Where his testimony is based exclusively on assumptions which are not supported by the facts of this case, his opinions are inadmissible and cannot be accorded weight.

Plaintiff's attempt to turn his petition into a study of whether he must prove "probable" or "possible" cause begs the question here. In this case there

exists no evidence of negligence other than wholly unsubstantiated speculation. Under these circumstances, under any standard, plaintiff's case falls.

II. PLAINTIFF PRESENTED ABSOLUTELY NO EVIDENCE THAT THIS INCIDENT WAS FORESEEABLE.

Stover's claim that his scant evidence presents a jury question is even more dubious when it is considered that the foreseeability of an injury is an essential element of negligence on the part of the railroad. Inman v. Baltimore & Ohio R.R. Co., 361 U.S. 138, 140 (1959); Norfolk & Western Railway v. Hughes, 247 Va. 113, 439 S.E.2d 411, cert. denied, 114 S. Ct. 2136 (1994). There is a complete dearth of testimony in the record that NW should have been on notice that Stover might injure himself on the mechanism in question. A failure to show that a condition is "foreseeably"

dangerous is fatal to claims under the FELA. See Inman, 361 U.S. at 140; Hurley v. Patapsco & Back Rivers R. Co., 888 F.2d 327, 330 (4th Cir. 1989).

Plaintiff, here, fails to reveal any evidence of complaints to put NW on notice of a problem concerning the derail. Indeed, just the opposite is true. The mechanism at issue was one of three derails with brand new operating stands located at Rocky Mount. The stand had been in place only six weeks. During this time plaintiff and others had used it on a daily basis without any problems or complaints. (J.A. 127-28, 157, 473.) While plaintiff contended that he had complained about various derails on the system, he specifically testified that he never complained about this particular derail. (J.A. 128, 139.) Track Supervisor Gearhart stated that he had

received no complaints concerning this derail. (J.A. 473.) Indeed, it was uncontested that the new stand made the derail much easier to throw than the older pipe-fitted derails. (J.A. 155, 543.)

The theory of plaintiff's negligence claim is that the derail so badly lacked lubrication that it became dangerous to throw. Surely, if this were true, plaintiff, or some other employee, during daily use of the derail, would have experienced and complained about the alleged condition during the weeks prior to this incident. Yet none did. Nor did NW's monthly inspection of the siding (J.A. 472, 500-01) reveal such a problem.

Even plaintiff's expert, Hockaday, confirmed that if a derail were improperly lubricated, it would become progressively harder to throw with each

passing day. (J.A. 283.) Yet, during the six weeks prior to this incident, plaintiff and his co-workers had thrown this derail on a daily basis with no problems whatsoever, a fact of which Hockaday was completely unaware. (J.A. 273.)

Hockaday further testified that if something is wrong with a derail, then some action must be taken to correct the problem in order for the derail to throw properly. Specifically, if the derail lacks lubrication, then lubrication must be added to correct the problem (J.A. 278-79). This testimony parallels that given by J. McCracken who also testified that a derail which lacks lubrication will get progressively harder to throw until it is lubricated. (J.A. 556-59, 574.) The uncontroverted evidence in this case, again, is that no lubrication

was added to this derail or operating stand for at least thirty days following plaintiff's incident. (J.A. 487.) Yet the derail was operated on numerous occasions after this incident by other witnesses, all of whom found the derail to be operating flawlessly. (J.A. 478, 497, 508-09, 532, 537.) Indeed, the very day plaintiff claimed it hung-up, NW officials threw the derail over one hundred times without any difficulty. (J.A. 508.)

Thus, the uncontroverted evidence, including plaintiff's own testimony, is that this "hang-up" was a single, isolated event, rather than a progressive problem due to a lack of lubrication. Plaintiff's lengthy discussion of Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963) does not change this result. In Gallick, as plaintiff concedes, the

employer was on notice that its workers were forced to contend with a fetid pool and the related threats such a condition might spawn. Here, there is no evidence that a lack of lubrication existed, except through Hockaday's assumptions. Nor is there evidence of any perceived threat or complaint related to the derail in question. Indeed, quite to the contrary, the evidence from plaintiff himself is that this derail had never given him a moment's trouble, and that the mechanism had been recently updated.

III. THE VIRGINIA SUPREME COURT PROPERLY CALLED UPON STOVER TO INTRODUCE SOME EVIDENCE THAT THE NEGLIGENCE ALLEGED WAS A PROBABLE CAUSE OF HIS INJURY.

Plaintiff's evidence utterly fails to establish how the accident happened or that the derail mechanism actually malfunctioned. Plaintiff himself candidly conceded that the derail could

have "hung up" either due to a lack of lubrication or his own failure to lift the derail's lever high enough. Stover testified:

> Q. Do you remember saying at your formal hearing [Law Board proceedings] that when it hung up on you, you lifted up higher and came around with it?
>
> A. Yes, sir. I did jerk up on it and came around with it.

(J.A. 133-34.)

> Q. Do you remember telling the formal hearing that you might not have lifted up high enough on that?
>
> A. I don't remember what I said at the formal hearing. I have no idea.
>
> Q. Do you remember being asked, "Is it possible you didn't raise the handle up high enough to get by that groove?"
>
> A. Anything's possible.
>
> Q. That is what you said that day, isn't it, sir? You answered, "Anything is possible. Now, whatever, you know, when you are doing something, you are trying to pay attention to what

> you do. But I thought I had it all the way. I might not have had it up all the way. I do not know, and all I know is it hung."

A. That is exactly right.

(J.A. 135-36.) (Emphasis added.) That is ultimately why Stover conceded that his case, absent Hockaday's testimony, could not reach the jury. (App. 55.) At best, plaintiff has done nothing more than posit two possible explanations for the derail incident. He does not know which explanation actually caused the incident. For one possible scenario, NW has absolutely no culpability.

Stover seeks to skewer the Supreme Court of Virginia for stating that the plaintiff must, at least, introduce evidence supporting a reasonable inference that the alleged lubrication defect was the probable cause of his injury. Calhoun v. Honda Motor Co., 738

F.2d 126, 133 (6th Cir. 1984). (App. 56.) Without such a modest evidentiary showing, a jury could not find for the plaintiff except by raw speculation. Stover confuses the standard of Rogers v. Missouri-Pacific R. Co., 352 U.S. 500, 507 (1957) (whether negligence played any role in his injury) with his obligation to introduce evidence of negligence. An FELA plaintiff still must prove negligence. Ellis v. Union Pacific R. Co., 329 U.S. 649, 653 (1947). That, Stover plainly failed to do here. He should not expect to present a jury issue by insinuating that a condition might have existed, and that it might have contributed to his injury. Indeed, here there was no evidence that the disputed condition existed except Hockaday's guesswork based on assumptions not supported by the record.

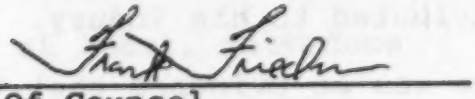
Ultimately, Stover argues that if he is injured, under the FELA he is entitled to reach a jury. As this Court has ruled on numerous occasions, however, an employer under the FELA is not an insurer of his employee's safety. Ellis, 329 U.S. at 653; Inman, 361 U.S. at 140. NW respectfully submits that this Court should decline plaintiff's invitation to rewrite this time-honored rule.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

NORFOLK AND WESTERN RAILWAY COMPANY

By 
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